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Sabarudin bin Non & Ors v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEALS NO A–05–37 OF 2003, A–05–38 OF 2003, A–05–39 OF 2003 AND A–05–40 OF 2003
GOPAL SRI RAM, HASHIM YUSOFF AND BAHARUDIN SHAH JJCA
B 30 OCTOBER 2004

Criminal Law — Common intention — Whether presence is necessary — Acting in concert to crime committed via cell-phone — Whether constructively present and participated in crime — Penal Code s 34

C

Evidence — Accomplice — Corroboration — Corroboration on the very axis of dispute and not on collateral or freely admitted facts — Discrepancies of testimony by accomplice — Whether evidence sufficiently corroborated by way of circumstantial evidence

Evidence — Accomplice — Credibility — Accomplice turned prosecution witness — Discrepancies
D *of testimony by accomplice — Whether evidence sufficiently corroborated by way of circumstantial evidence*

The first accused was found guilty to a reduced charge of culpable homicide not amounting to murder of one Hazleza Ishak ('the deceased'). He was sentenced and subsequently became the prosecution witness PW34. He testified that he
E was recruited by the fourth and fifth accused to kill the deceased. He obtained the assistance of the second and third accused for that purpose. The second to fifth accused persons were all found guilty and they appealed. The appeal was argued on three main grounds: (1) that the learned judge did not judicially appreciate or evaluate the evidence of PW34; (2) that the confession of the second
F accused had been wrongly admitted and used; (3) that the learned judge had, in so far as the fourth and fifth accused were concerned, failed to give due consideration to the defence of these accused persons. Counsel for the fourth and fifth accused submitted that since neither of their clients was present at either the scene of the abduction nor at the place where the deceased was done
G unto death, nor at the scene where her body was cast into the ravine, s 34 of the Penal Code had no application to the fourth and fifth accused.

Held, dismissing all the appeals:

(1) The learned judge correctly directed himself on the law in finding PW34
H to be a credible witness and proceed to the issue of corroboration (seepara 7). In holding PW34 to be a credible witness the learned judge took into account the whole of that witness' evidence and tested it against the probabilities of the case (see para 8). There was no misdirection on the part of the learned judge. Instead there was ample material to support
I the finding of credibility made by the learned judge in favour of PW34 (see paras 11 and 12). The discrepancies of PW34 was not of such a nature as to demolish the core of his evidence. And that core, from beginning

to end, was that he acted on the direction of the fourth and fifth accused to kill the deceased and that he was assisted in his task by the second and third accused (see para 13). A

(2) As against the second and third accused, PW34's evidence must be corroborated on the very axis of the dispute and not on collateral or freely admitted facts. An examination of the evidence shows abundant corroboration that both accused were present and participated in a criminal act (seepara 15). Furthermore, the fact that the second accused went into hiding was a strong circumstance against him that corroborated PW34's evidence (see para 16). There was also sufficient corroboration by way of circumstantial evidence that the fourth and fifth accused instructed PW34 to abduct and kill the deceased (see para 17). B C

(3) On the liability of the second and third accused under s 34 of the Penal Code, the two accused were present and participated in the abduction of the deceased. Neither the second nor the third accused lifted a finger to save or to rescue the deceased. Further, they assisted in the disposal of the body of their victim. The facts of the present instance constitute the most obvious case of the application of s 34. These two accused attempted to wash themselves of criminality with a story which did not raise a reasonable doubt in the mind of the learned trial judge (see para 30). D

(4) Presence in every case is not necessary for s 34 to apply. Section 34 should be interpreted having regard to modern technological advances. It would be a perversion of justice if the court were required to cling on to an interpretation of the section made at a time when science was at a very early stage of development (see para 31). The fourth and fifth accused were acting in concert. By means of the cell-phone and other conversations, they were very much constructively present and participated in the abetment of the killing of the deceased (see para 32). E F

(5) There was no merit in the submission of learned counsel for all accused that there was insufficient consideration of their defence. The defence of innocent association was demolished by the direct and circumstantial evidence presented by the prosecution. The defence did not raise a reasonable doubt at all (see para 33). G

(6) Having regard to the evidence on the *voir dire* and the brief note of the learned judge's reasons, the confession of the second accused was wrongly admitted. It would appear that the learned judge had shifted the burden onto the second accused to prove that he had been oppressed. Therefore the court excluded the confession and all references to it in the record of appeal, including those areas where the learned judge called it in aid (see para 36). Nevertheless, there were abundant evidence to support the convictions of the accused persons. It is settled law that an accused's conviction may be upheld if there is other evidence to support it after excluding an inadmissible confession (see para 37). H I

[**Bahasa Malaysia summary**

Tertuduh pertama didapati bersalah kerana menyebabkan kematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang bernama Hazleza Ishak ('si mati'). Beliau dijatuhkan hukuman dan kemudiannya menjadi saksi pihak pendakwa PW34. Beliau memberi keterangan bahawa beliau telah diarah oleh tertuduh keempat dan kelima untuk membunuh si mati. Beliau mendapat bantuan daripada tertuduh kedua dan ketiga bagi tujuan tersebut. Tertuduh kedua hingga kelima kesemuanya didapati bersalah dan mereka merayu. Rayuan tersebut dihujahkan berdasarkan tiga alasan utama: (1) bahawa hakim yang bijaksana tidak mendalami atau meneliti secara adil keterangan PW34; (2) bahawa pengakuan tertuduh kedua salah diterima masuk dan digunakan; (3) bahawa hakim yang bijaksana telah, setakat mana tertuduh keempat dan kelima adalah berkaitan, gagal untuk memberikan pertimbangan yang sewajarnya terhadap pembelaan mereka yang tertuduh tersebut. Peguam bagi pihak tertuduh keempat dan kelima berhujah bahawa memandangkan anak guam mereka tidak hadir di mana-mana tempat kejadian penculikan mahupun tempat di mana si mati dibunuh, mahupun di tempat di mana mayat si mati dicampak ke dalam gaung, s 34 Kanun Keseksaan tidak terpakai ke atas tertuduh keempat dan kelima tersebut.

Diputuskan, menolak kesemua rayuan-rayuan tersebut:

(1) Hakim yang bijaksana dengan betul mengarahkan dirinya dalam undang-undang semasa memutuskan PW34 adalah saksi yang boleh dipercayai dan meneruskan persoalan tentang sokongan (lihat perenggan 7). Dalam memutuskan PW34 adalah saksi yang boleh dipercayai, hakim yang bijaksana mengambil kira keseluruhan keterangan saksi dan mengujinya atas kebarangkalian kes (lihat perenggan 8). Tiada salah arah di pihak hakim yang bijaksana. Sebaliknya terdapat bahan yang mencukupi untuk menyokong penemuan kebolehpercayaan yang dibuat oleh hakim yang bijaksana yang memihak kepada PW34 (lihat perenggan 11 dan 12). Percanggahan oleh PW34 tidak bersifat untuk memusnahkan keterangan utama beliau. Dan intipati keterangan, dari mula hingga akhir, adalah bahawa beliau bertindak atas arahan tertuduh keempat dan kelima untuk membunuh si mati dan beliau membantu dalam perbuatan tertuduh kedua dan ketiga (lihat perenggan 13).

(2) Berhubung tertuduh kedua dan ketiga, keterangan PW34 perlu disokong berdasarkan pertikaian yang berlaku dan bukan secara kolateral atau fakta yang diakui secara sukarela. Satu pemeriksaan keterangan menunjukkan sokongan yang kukuh bahawa kedua-dua tertuduh hadir dan terlibat dalam perbuatan jenayah tersebut (lihat perenggan 15). Tambahan pula, hakikat bahawa tertuduh kedua bersembunyi merupakan keadaan yang kuat bagi menyokong keterangan PW34 (lihat perenggan 16). Terdapat juga sokongan yang mencukupi melalui keterangan ikut keadaan bahawa tertuduh keempat dan kelima telah mengarah PW34 untuk menculik dan membunuh si mati (lihat perenggan 17).

(3) Mengenai liabiliti tertuduh kedua dan ketiga di bawah s 34 Kanun Keseksaan, kedua-dua tertuduh hadir dan terlibat dalam penculikan simati. Tertuduh kedua mahupun ketiga tidak menolong langsung untuk menyelamatkan si mati. Tambahan pula, mereka membantu membuang mayat si mangsa. Fakta kes semasa membentuk satu kes nyata pemakaian s 34. Kedua-dua tertuduh telah cuba mengelakkan diri daripada jenayah tersebut dengan cerita yang tidak menimbulkan keraguan munasabah dalam pemikiran hakim perbicaraan yang bijaksana (lihat perenggan 30).

(4) Kehadiran dalam setiap kes bukan satu kemestian untuk s 34 terpakai. Seksyen 34 hendaklah ditafsirkan berdasarkan teknologi moden yang canggih. Adalah tidak adil jika mahkamah dikehendaki bergantung kepada tafsiran seksyen yang dibuat pada masa ilmu sains baru mula berkembang (lihat perenggan 31). Tertuduh keempat dan kelima bertindak bersama. Dengan penggunaan telefon bimbit dan percakapan lain, mereka sememangnya hadir secara konstruktif dan terlibat dalam membantu pembunuhan si mati (lihat perenggan 32).

(5) Tiada merit dalam hujah peguam yang bijaksana untuk kesemua tertuduh bahawa tiada pertimbangan yang mencukupi dalam menilai pembelaan mereka. Pembelaan penglibatan tidak bersalah terhapus oleh keterangan langsung dan ikut keadaan yang dikemukakan oleh pihak pendakwa. Pembelaan tersebut tidak menimbulkan keraguan munasabah langsung (lihat perenggan 33).

(6) Setelah meneliti keterangan secara *voir dire* dan nota ringkas alasan-alasan hakim yang bijaksana, pengakuan tertuduh kedua telah diterima pakai secara salah. Ia kelihatan yang hakim yang bijaksana telah mengalihkan beban ke atas tertuduh kedua untuk membuktikan bahawa beliau telah ditindas. Oleh itu mahkamah telah mengecualikan pengakuan tersebut dan semua rujukan kepadanya dalam rekod rayuan, termasuklah bahagian di mana hakim yang bijaksana gunakan sebagai menyokong kes (lihat perenggan 36). Namun begitu, terdapat banyak keterangan yang menyokong sabitan-sabitan mereka yang dituduh itu. Adalah undang-undang tetap bahawa sabitan tertuduh boleh dikekalkan jika keterangan lain menyokongnya selepas mengecualikan satu pengakuan yang tidak boleh diterima pakai (lihat perenggan 37).]

Notes

For cases on corroboration of accomplice evidence, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 809–833.

For a case on corroboration of evidence by the prosecution witness, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 924.

For cases on credibility of accomplice, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) para 45–47.

Cases referred to

Arts Niche Cyber Distribution v Public Prosecutor [1999] 4 SLR 111 (refd)
Chao Chong v Public Prosecutor [1960] MLJ 238 (refd)
Hari Ram v State of Uttar Pradesh [2004] 3 LRI 523 (refd)
Lee Yew Seng v Public Prosecutor [1967] 1 MLJ 215 (refd)
Lim Guan Eng v Public Prosecutor [1998] 3 MLJ 14 (refd)
Queen-Empress v Gobardhan ILR 9 All 528 (refd)
R v Hills (1988) 86 Cr App R 26 (refd)
Suresh v State of Uttar Pradesh AIR 2001 SC 1344 (refd)
Tang Kin Seng v Public Prosecutor [1997] 1 SLR 46 (refd)
Tengku Mahmood v Public Prosecutor [1974] 1 MLJ 110 (refd)

Legislation referred to

Evidence Act 1950 s 14
Penal Code ss 34, 109, 302

Appeal from: Criminal Trials No 45–5 of 2002 and 45–6 of 2002 (High Court, Taiping)

Gurbachan Singh (Bachan & Kartar) for the appellant in Criminal Appeal No A–05–37 of 2003.
Muhammad Shafee Abdullah (Frida Krishnan and M Kirubanandan with him) (Shafee & Co) for the appellant in Criminal Appeal No A–05–38 of 2003.
A Tanasekharan (N Ahilan with him) (A Thanasekharan & Co) for the appellants in Criminal Appeals No A–05–39 of 2003 and A–05–40 of 2003.
Azmi bin Ariffin (Attorney General's Chambers) for the respondent in all the appeals.

Gopal Sri Ram JCA (delivering judgment of the court):

PRELIMINARY

[1] Hasleza Ishak was 26 years old when she died. She was cut down in the prime of her life. This case concerns the circumstances in which she met her end. The four accused who stand before us as appellants were originally charged with one other, the first accused in the court below for her murder. We will for convenience refer to the appellants as the second, third and fourth and fifth accused respectively. The charges against them were as follows. First, as against the first accused (Mat Saad bin Mat Isa), the second and third accused, under s 302 of the Penal Code read with s 34 of that Code. Second, as against the fourth and fifth accused, under s 302 of the Penal Code read with s 109 of that Code. It is appropriate to mention that at after the trial had commenced and after PW25, the pathologist had given his evidence, the first accused pleaded guilty to a reduced charge of culpable homicide not amounting to murder. He was dealt with and sentenced to 14 years imprisonment. He then gave evidence for the prosecution as PW34. At the close of the case for the

prosecution, the learned trial judge ruled that the prosecution had made out a case for the appellants to answer. However, at the close of the whole case, that is to say, after hearing the defence and their witnesses, the learned trial judge amended the charges as follows. As against the second and third accused, a charge under the first limb of s 304 read with s 34 of the Penal Code was preferred. As against the fourth and fifth accused, the learned judge amended the charge to one under s 304 of the Penal Code read with ss 109 and 34 of the Penal Code. The learned judge then proceeded to convict each of the accused on the amended charge and sentenced each of them to 20 years imprisonment. We note that there is no cross appeal by the Public Prosecutor against the learned judge's decision to convict on the lesser charge.

ISSUES AND ARGUMENTS

[2] From the prosecution's point of view, this is a simple and straightforward case. It is common ground that this case turns almost entirely on the evidence of PW34. The evidence of that witness in a nutshell is that he was recruited by the fourth and fifth accused to kill the deceased. He obtained the assistance of the second and third accused for that purpose. Late in the evening of 6October 2002, PW34, the first and second accused abducted Hasleza, whom we will hereafter refer to as 'the deceased'. After the abduction, the deceased was taken to another place some distance away where PW34 delivered a 'karate chop' or blow to the neck of the deceased to silence her. The deceased was then bundled into the second accused's car and taken to a bridge where she was cast into a ravine. She was already dead by then. According to the medical evidence, death was caused by asphyxiation, that is to say, pressure being applied to the front of the neck. In other words, the deceased probably died of suffocation through manual strangulation. It is a point to note that throughout the entire episode, that is to say, from the moment of the deceased's abduction up to and after her body had been disposed of, the second accused drove his car which was used to transport the deceased, both when she was alive and after she had died. For completeness we would add that sometime later, the accused were arrested and charged as aforesaid.

[3] Before us the appeal was argued on three main grounds. First, that the learned judge did not judicially appreciate or evaluate the evidence of PW34. Second, that the confession of the second accused had been wrongly admitted and used. Third, that the learned judge had, in so far as the fourth and fifth accused are concerned, failed to give due consideration to the defence of these accused persons. We will deal with these complaints in a format that we find convenient.

APPRECIATION OF PW34'S EVIDENCE

(i) The relevant test

[4] There is no dispute that PW34 is an accomplice. The learned trial judge certainly appreciated this. In his judgment he castigated PW34 in the strongest

of terms. This is hardly surprising. After all, it was PW34 who killed the deceased. There are passages in the judgment of the learned judge referring to the test to be applied to determine who an accomplice is. Some of these passages are quite open to the interpretation that only *participes criminis* are accomplices. With respect, although the question is entirely academic on the facts of this case in view of the prosecution's concession that PW34 was an accomplice, we think it necessary to clarify the point for future cases. In our judgment, the correct test for determining whether a witness is an accomplice is that laid down by Thomson CJ in *Chao Chong v Public Prosecutor* [1960] MLJ 238:

> The true question, however, was not the technical one of whether the witness could have been convicted for his participation in the offence if he had been prosecuted. The true question was whether, having regard to his participation in the offence and having regard to all the circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted.

[5] We now return to the mainstream. It is true, as Mr Gurbachan Singh of counsel for the fourth accused pointed out, that PW34 was a self-confessed liar. The witness openly admitted that. True again that there are some contradictions in the evidence of this witness. All these are matters eminently for the learned trial judge to address and take into account. And the question at the end of the day for the learned trial judge, and not for us, to decide was whether PW34 was telling the truth about the role played by the other accused in the commission of this heinous crime. Of course, if the learned judge did not judicially appreciate the evidence of this witness as contended by learned counsel Mr Gurbachan Singh, then, of course, we will be duty bound to intervene.

[6] Now, in the judicial appreciation of the evidence of an accomplice there is a special rule for the guidance of the court. It is this. The evidence of an accomplice must be both credible and be corroborated. The first element, namely, credibility, is a requirement that must be met by all witnesses. The second is peculiar to an accomplice. Once an accomplice is found by a trial court to be an unreliable witness, then his evidence must be rejected and no question of corroboration can arise. This court in *Lim Guan Eng v Public Prosecutor* [1998] 3 MLJ 14 set out the principles governing evidence that requires corroboration whether as a matter of practice or as a matter of written law as follows:

> So far as the law governing corroboration is concerned, we accept the following propositions to be well settled and beyond controversy:
>
> (1) As a general rule, the conviction of an accused may proceed upon the uncorroborated evidence of one witness.
>
> (2) There are cases where either common law — as a matter of practice which has, through passage of time, acquired the force of law — or statute, creates an exception to the general rule in respect of certain categories of witnesses by calling for, or indeed demanding, that their evidence may not to be acted upon in the absence of independent corroboration.

Accomplices illustrate the common law exception, while s 6(1) illustrates the statutory exception.

(3) Evidence that requires corroboration, whether as a matter of practice having the force of law or by direction of statute:

(a) must first be capable of belief before any question of corroboration may arise, for evidence that falls of its own inanition cannot be saved by the presence of abundant corroboration;

(b) cannot corroborate itself, for tainted evidence does not remove its taint by repetition, notwithstanding s 157 of the Evidence Act 1950; and

(c) cannot be corroborated by evidence that itself requires corroboration.

(4) To constitute true corroboration in the eyes of the law, the corroborative evidence must:

(a) be capable of belief;

(b) be independent in the sense mentioned in proposition (3)(c) above;

(c) be in respect of the fact or facts that lie at the axis of the dispute, that is to say, upon the fact in issue and not upon some collateral matter or upon a fact in respect of which there is no quarrel. In other words, it must be corroboration upon a material particular but need not be identically repetitive of the evidence that requires corroboration.

(5) At common law, a trial court is entitled to act upon uncorroborated evidence which in itself requires corroboration provided that it warns itself of the danger of so acting. The warning must not amount to mere lip-service. Good reasons must be furnished for departing from the accepted rule. Departure from the normal rule may be justified where the evidence requiring corroboration emanates from a witness who is a person of high character and the offence is one that does not carry with it any serious moral stigma.

The authorities that support these propositions are legion and include *R v Baskerville* [1916] 2 KB 658, *Chao Chong v Public Prosecutor* [1960] MLJ 238, *Teng Ser Siong v Public Prosecutor* [1963] MLJ 265, *TN Nathan v Public Prosecutor* [1978] 1 MLJ 134, *Jegathesan v Public Prosecutor* [1980] 1 MLJ 165, *Dowse v Attorney General, Federation of Malaya* [1961] MLJ 249, *Bhuboni Sahu v King Emperor* AIR 1949 PC 257, *Mohamed Ali v Public Prosecutor* [1962] MLJ 230, *Yap Ee Kong & Anor v Public Prosecutor* [1981] 1 MLJ 144, *Public Prosecutor v Paneerselvan & Ors* [1991] 1 MLJ 106 and more recently *Public Prosecutor v Thavananthan* [1994] 2 MLJ 436.

[7] A reading of the learned judge's judgment reveals that he was most conscious about the principles in the above-quoted passage and applied them. In his grounds of judgment the learned judge found PW34 to be a credible witness. Only then did he proceed to the issue of corroboration. In our judgment he correctly directed himself on the law.

(ii) The issue of credibility

[8] Based on the submissions of counsel before us the question is whether the learned judge properly evaluated PW34's evidence. In holding PW34 to be a credible witness the learned judge took into account the whole of that witness' evidence and tested it against the probabilities of the case. We find this approach to accord with the general principles that courts have laid down for themselves in the judicial appreciation of oral evidence. Thus, in *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110 where Raja Azlan Shah FJ said that:

> a judge of fact should always test the complainant's evidence against the totality of his evidence and the probabilities of the case. Failure to do so does amount, in my view, to a misdirection…

[9] On the methodology of assessing a witness' evidence we can do no better than to cite the following passage from *Sarkar on Evidence* (15th ed) p 99:

> The Act does not purport to lay down any rule as to the weight to be attached to the evidence when admitted, nor is any such rule possible for the proper appreciation of evidence is a matter of experience, common sense and knowledge of human affairs. 'For weighing evidence and drawing inferences from it, there can be no canon. *Each case presents its own peculiarities, and common sense and shrewdness must be brought to bear upon the facts elicited in every case which a judge of facts in this country discharging the functions of a jury in England, has to weigh and decide*' (per Birch J in *R v Madhub* 21 WR Cr 13, 19; *Mahendrapal v State* AIR 1955 A 238 …
>
> Neither the Evidence Act nor any other Act lays down any law governing the question which statement of a witness should be believed or should not be believed. The question depends upon so many circumstances that it is impossible to lay down hard and fast rules. The law has left it to the court to decide whether the evidence should be believed or not and, if believed, what weight should be attached to it or what effect should be given to it. *These matters have been left at the sound discretion of the court. When the Legislature itself has left them at the discretion of the court, it is not open to the highest court to fetter the discretion by laying down hard and fast rules, because it would be tantamount to legislating* (*Jwala v State*, AIR 1963 All 161 FB). (Emphasis added.)

[10] In Chaudiri's *Law of Confession, Approvers and Accomplices* (7th ed, 1999) which is the leading text on the subject, the learned author states as follows:

> Whether the evidence of the approver in any given case may be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what he has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, whether his evidence is merely self-exculpatory and so on and so forth.

[11] Based on the foregoing authorities, we are unable to find any misdirection on the part of the learned judge. Further, having carefully scrutinised the evidence led by the prosecution, we are satisfied that there is ample material to support the finding of credibility made by the learned judge in favour of

PW34. We find it unnecessary to set out all of them here. Suffice that we mention some items of evidence which illustrate the correctness of the learned judge's finding on the issue of PW34's credibility. First, PW34 testified that he had broken the deceased's car window with a blow of his fist. The police examination of the deceased's car revealed this to be the case. Second, he testified that he, together with the second and third accused threw the body of the deceased into a ravine. A few days after the deceased was killed, her body was indeed found at the bottom of a ravine. Third, he said that the body of the deceased had been placed on the rear seat of the second accused's car. A forensic examination of the car in question confirmed this. Fourth, PW34 was not a self serving and exculpatory accomplice as he fully implicated himself and made a clean breast of his own illegal acts. He readily admitted his frailties when confronted with them. He appears to have withstood the pressured strain of searching cross-examination by experienced counsel.

[12] There is this further consideration. The learned trial judge who had the singular advantage of observing and hearing PW34 for several days in the witness box accepted him as a witness of truth. Even putting to one side all observations as to demeanour, we are entirely in agreement with the learned judge's finding that PW34 is a credible witness and would accordingly affirm his finding in that regard. Indeed, we have taken the additional precaution of reading and re-reading PW34's evidence and find his story entirely credible having regard to all the surrounding circumstances of this case.

[13] Our attention was drawn both by Mr Gurbachan Singh for the fourth accused and Dato Muhammad Shafee of counsel for the fifth accused to several discrepancies in the evidence of PW34. We are indeed grateful to both counsel for having taken us through the printed evidence with a fine-tooth comb both in oral submissions and in their written summary. However, we are not convinced that the discrepancies are of such a nature as to demolish the core of PW34's evidence. And that core, from beginning to end, was that he acted on the direction of the fourth and fifth accused to kill the deceased and that he was assisted in his task by the second and third accused.

[14] On this part of the case we would once again quote from *Sarkar on Evidence* at p 109:

> Discrepancies do not necessarily demolish testimony (*Narotam v State* AIR 1978 SC 1542). Discrepancies in the testimony of various witnesses on material or broad points have to be carefully weighed in arriving at the truth. But trifling discrepancies should be ignored, as they are often a test of truth. Several persons giving their versions of a transaction witnessed by them are naturally liable to disagree on immaterial points. Their powers of observation, expression or memory are not the same and honest differences are easily possible. It must be remembered that there are discrepancies of truth as well as falsehood. It is the broad facts of a case and not the little details that are to be considered in weighing evidence.

(iii) Corroboration

(a) As against the second and third accused

[15] The next issue is whether PW34's evidence was corroborated in material particulars. We emphasise that it is an essential requirement of the law that PW34's evidence must be corroborated on the very axis of the dispute and not on collateral or freely admitted facts. With this in mind let us now consider the case of the second and third accused. The question here is whether they were present and participated in a criminal act. That is the issue which lies at the axis of the dispute. An examination of the evidence shows abundant corroboration on this point. Again we find it unnecessary to go through all the items of evidence. Suffice that we mention three matters. First is the fact of their admitted presence at the scene of the deceased's abduction, at the place where she was done unto death and the scene at which her body was disposed of. Second, as observed earlier there is the fact that it was the second accused who used his car and acted as driver throughout the whole episode. Third, there is the evidence of the act of the second accused absconding when he saw the police about his home. It is trite that the act of an accused absconding may amount to corroboration, although it may, standing by itself, be a very weak corroborating element. Asobserved by the Court in *Queen-Empress v Gobardhan* ILR 9 All 528:

> As to the fact that Gobardhan was a party to the murder, the only corroboration of Mahasukha's evidence which I find, taking the view of the whole of the evidence which I do, is afforded by Gobardhan himself. He absconded and remained away until he was arrested seven months after Nehal Singh's death. Gobardhan and his witnesses gave a false account as to the time when he left his village, and he has never given any other. This, I think, is some corroboration of Mahasukha's evidence that Gobardhan was a party to the murder, and is sufficient for us to act upon.

[16] In the present instance, the act of the second accused absconding does not stand alone. There are the other facts to which we have already referred. Accordingly, on the facts of this case, the fact that the second accused went into hiding is a strong circumstance against him that corroborates PW34's evidence.

(b) As against the fourth and fifth accused

[17] The axis of the dispute so far as the case of the fourth and fifth accused is concerned is whether they instructed PW34 to abduct and kill he deceased. On this issue we find sufficient corroboration by way of circumstantial evidence. First, there is the evidence of PW6 who witnessed the abduction of the deceased. Learned counsel for the fifth accused concedes this corroborates PW34's version. Second, there is the evidence of the phone calls made by PW34 to the fourth accused and those made by the fourth accused to the fifth accused at the material time as well as calls made by the fifth accused to the fourth accused and by the fourth accused to PW34 led through PW52 and PW54. The first of these was made by PW34 on the second accused's cell-phone on 6 October 2002

at about 6pm. It was made to the fourth accused's cell-phone. It is common ground that this was after the deceased had been abducted and brought elsewhere. PW34's evidence was that he informed the fourth accused by means of this call that the deceased was in his power. He asked the fourth accused what he was to do with her: whether she was to be sent to the fourth accused's home or whether the fourth accused wished to send her to the fifth accused's home. According to PW34, he was told by the fourth accused to dispose of the deceased as already instructed by the fifth accused. The next phone call was made by PW34, again using the second accused's cell-phone. It was made on 6 October 2002 at about 11pm. By this time the deceased's body had already been cast into the ravine.

[18] There is also evidence to show that between the hours of 6pm on 6October 2002 and 7 October 2002, several attempts were made by PW34 to reach the fourth accused. This is reflected in the evidence of PW52 and PW54. We accept the submission of learned counsel for the fourth and fifth accused that each of these calls lasted only a few seconds thereby indicating that these were all failed attempts. But the point made by the prosecution — and it is a most valid point — is that these calls go to show the state of mind of PW34 during the material period of time. They are admissible by virtue of s 14 of the Evidence Act 1950. They go to show that PW34 was desperately trying to reach the fourth accused.

[19] Now, what are the relevant inferences that the circumstances here admit? PW34 had the deceased under his control when he telephoned the fourth accused at about 6pm. He either telephoned the fourth accused for a wholly innocent purpose (as contended by the defence) or to ask for instructions. Given the totality of the circumstances, it is, in our judgment, entirely improbable that PW34 telephoned the fourth accused for an innocent purpose. It is inconceivable, given the totality of the evidence that PW34 would not have mentioned to the fourth accused that he (PW34) had the deceased under his control.

[20] Take now the second call on 6 October 2002 made at about 11pm. Asalready noted, this was again made using the cell-phone of the second accused. It was made to the fourth accused's home. According to PW34, he informed the fourth accused that the deceased whom fourth accused had wanted killed had been disposed of. The defence contends that this conversation was again entirely innocent. But we consider, having regard to the totality of the evidence that the more probable inference is that the conversation was as described by PW34. It is beyond imagination that having got rid of the deceased PW34 would not have mentioned her at all during the telephone conversation.

[21] There is an additional feature in this case which strongly supports the prosecution as to the probable contents of the aforesaid telephone conversations. As we have earlier observed, PW34 was desperately trying to reach the fourth

accused at various times during the whole of the episode in question. Why would he do that unless he wanted to communicate to the fourth accused the status quo prevailing from time to time as events developed? This goes to support the conclusion that PW34 was not taking matters into his own hand but was seeking the fourth accused's directions from time to time. Further, there is evidence that after receiving PW34's call at about 6pm, the fourth accused immediately attempted to call the fifth accused on his cell-phone. That call failed. Thereafter he called the fifth accused's house and the evidence shows that that call lasted for about 1 minute 25 seconds. There is also evidence that at about 11pm on 6 October 2002, after receiving PW34's call, the fourth accused contemporaneously made a call to the fifth accused and almost immediately after that called PW34. This, in our judgment shows complicity on the part of the fourth and fifth accused. That is the obvious and the only reasonable inference to be drawn from the facts. It is therefore hardly surprising that the learned trial judge rejected the suggestion that the telephone conversations in question were entirely innocent.

[22] The next piece of circumstantial evidence is provided by the fourth and fifth accused themselves. It is important to recall their version of the story. According to them, PW34 had been engaged to exorcise the 'santau' or spirit which had plagued the Raja Perempuan Muda and with which the deceased had something to do. It is common ground that the fifth accused led the fourth accused and PW34 (who travelled together in the fourth accused's car) to show the deceased's house to perform the rituals that would rid the Raja Perempuan Muda of the evil spirit. In other words, showing the location of the deceased's house was for an entirely innocent purpose. However, according to PW34, itwas to identify to him the house of the person he was meant to kill. Now, when the fourth accused gave evidence he agreed under cross-examination by the learned deputy that it was unnecessary to visit a person's home if one wanted to exorcise 'the santau' or evil spirit. That concession puts paid to the defence suggestion that the drive to locate the deceased's house was for an innocent purpose.

[23] As for the fifth accused, there were phone calls made to him by the fourth accused on the evening of 6 October 2002 and in the early hours of 7October 2002. The phone calls were made contemporaneously with the calls received by the fourth accused from PW34. These calls, in our judgment strongly support the inference that the fourth accused was keeping the fifth accused abreast of the goings on as reported to him by PW34.

[24] We therefore agree with the following direction by the learned judge on this part of the case:

> In my view after considering their conversations which are especially within their knowledge, the time and timing of their calls and communication and the totality of the evidence for the prosecution, I find the communication between the three above persons in the itemised bill constitute corroboration of Saad's testimony.

[25] That circumstantial evidence may provide corroboration is established by *R v Hills* (1988) 86 Cr App R 26, where the court held as follows:

> Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove: (1) by medical evidence that she had had sexual intercourse within an hour or so prior to the medical examination; (2) by other independent evidence that the defendant and no other man had been with her during that time; and (3) that her underclothing was torn and that she had injuries to her private parts. None of these items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence.

[26] In *Tang Kin Seng v Public Prosecutor* [1997] 1 SLR 46, Yong Pung How CJ, Singapore, whose views this court treats with great respect, described the foregoing passage in *Hills* as follows:

> This is but common sense. The only surprise is that it took so long for it to be recognised. If a conviction for an offence can be secured solely on circumstantial evidence, there is no reason at all why corroboration cannot also be based purely on circumstantial evidence. The contrary position would lead to the absurdity that the prosecution's case is stronger if the victim is unable to give evidence.

[27] To sum up this part of the case, we find ourselves entirely in agreement with the learned judge's finding that PW34's evidence is credible and corroborated in material particulars. With that we now turn to deal with the liability of the accused under s 34 of the Penal Code.

COMMON INTENTION OF SECOND AND THIRD ACCUSED

[28] To deal with the criminal liability of the second and third accused, it is necessary first to quote from two recent authorities to remind ourselves of the law governing s 34. In *Suresh v State of Uttar Pradesh* AIR 2001 SC 1344, Sethi J speaking for himself and Agrawal J said:

> Section 34 of the Indian Penal Code recognises the principle of vicarious liability in the criminal jurisprudence. It makes a person liable for action of an offence not committed by him but by another person with whom he shared the common intention. It is a rule of evidence and does not create a substantive offence. The section gives statutory recognition to the common sense principle that if more than two persons intentionally do a thing jointly, it is just the same as if each of them had done it individually. There is no gain saying that a common intention pre-supposes prior concert, which requires a pre-arranged plan of the accused participating in an offence. *Such a pre-concert or pre-planning may develop on the spot or during the course of commission of the offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on a spur*

of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. (Emphasis added.)

[29] In *Hari Ram v State of Uttar Pradesh* [2004] 3 LRI 523 (SC) which was decided by the Indian Supreme Court in August 2004, Arijit Pasayat J said:

> Under the provisions of s 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in s 34, when an accused is convicted under s 302 read with s 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them. As was observed in *Ch Pulla Reddy & Ors v State of Andhra Pradesh* AIR 1993 SC 1899, s 34 is applicable even if no injury has been caused by the particular accused himself. For applying s 34 it is not necessary to show some overt act on the part of the accused.

[30] Applying these principles to the facts of the second and third accused's case it may be seen, as already mentioned, that these two accused were present and participated in the abduction of the deceased. When the deceased was then removed to another place and assaulted by PW34 and strangled by him, neither the second nor the third accused lifted a finger to save or to rescue her. Further, they assisted in the disposal of the body of their unfortunate victim. In our judgment the facts of the present instance constitute the most obvious case — a textbook example — of the application of s 34. These two accused attempted to wash themselves of criminality with a story which did not raise a reasonable doubt in the mind of the learned trial judge. That is the same view we entertain after a careful reading of the appeal record.

COMMON INTENTION OF THE FOURTH AND FIFTH ACCUSED

[31] The main point made and emphasised by both learned counsel for the fourth and fifth accused is that there must be presence and participation for s 34 to bite. They argue that since neither of their clients was present at either the scene of the abduction nor at the place where the deceased was done unto death, nor at the scene where her body was cast into the ravine s 34 has no application to the fourth and fifth accused. With respect, as a matter of law, we are unable to agree with this submission. In our judgment, presence in every case is not necessary for s 34 to apply. In our judgment, s 34 should be interpreted having regard to modern technological advances. The early decisions on the section, admittedly by the Privy Council, that held presence to be essential for s 34 to bite were handed down at a time when modes of communication were not as advanced as today. It would, in our judgment, be a perversion of justice if we are required to cling on to an interpretation of the section made at a time when science was at a very early stage of development. We find support

for our view from the judgment of Thomas J in *Suresh v State of Uttar Pradesh*, where his lordship said:

> Even the concept of presence of the co-accused at the scene is not a necessary requirement to attract s 34, eg the co-accused can remain a little away and supply weapons to the participating accused either by throwing or by catapulting them so that the participating accused can inflict injuries on the targeted person. Another illustration, with advancement of electronic equipment can be etched like this: One of such persons in furtherance of the common intention, overseeing the actions from a distance through binoculars can give instructions to the other accused through mobile phones as to how effectively the common intention can be implemented. We do not find any reason why s 34 cannot apply in the case of those two persons indicated in the illustrations.
>
> Thus to attract s 34 IPC two postulates are indispensable: (1) the criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person; (2) doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons.
>
> Looking at the first postulate pointed out above, *the accused who is to be fastened with liability on the strength of s 34 IPC should have done some act which has nexus with the offence*. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act. This is the purport of s 32 IPC. So the act mentioned in s 34 IPC need not be an overt act, even an illegal omission to do a certain act in a certain situation can amount to an act, eg a co-accused, standing near the victim face to face saw an armed assailant nearing the victim from behind with a weapon to inflict a blow. The co-accused, who could have alerted the victim to move away to escape from the onslaught deliberately refrained from doing so with the idea that the blow should fall on the victim. Such omission can also be termed as an act in a given situation. Hence an act, whether overt or covert, is indispensable to be done by a co-accused to be fastened with the liability under the section. But if no such act is done by a person, even if he has common intention with the others for the accomplishment of the crime, s 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of s 34 IPC. (Emphasis added.)

[32] So too here. The fourth and fifth accused were, on the evidence already rehearsed, acting in concert. By means of the cell-phone and other conversations, they were very much constructively present and participated in the abetment of the killing of the deceased. We may add that there is no quarrel by the defence that on the evidence, if accepted, there was abetment. There was no submission made that the elements of abetment were not made out as a matter of law. We therefore find it unnecessary to discuss the law upon that subject.

A CONSIDERATION OF THE DEFENCE

[33] We find no merit in the submission of learned counsel for all accused that there was insufficient consideration of their defence. As already demonstrated, while discussing the evidence of PW34 with which the defence case is intertwined, the defence of innocent association was demolished by the direct and circumstantial evidence presented by the prosecution. The learned judge found that the defence did not raise a reasonable doubt in his mind. We agree with his conclusion on this point.

[34] As to what is meant by 'reasonable doubt' we would refer to Underhill's treatise on *The Law of Criminal Evidence* (5th Ed, vol 1, at p 34) where the learned author states as follows:

> The doubt to be reasonable must be such a one as an honest, sensible and fair-minded man might, with reason, entertain consistent with a conscientious desire to ascertain the truth. An honestly entertained doubt of guilt is a reasonable doubt. *A vague conjecture or an inference of the possibility of the innocence of the accused is not a reasonable doubt. A reasonable doubt is one which arises from a consideration of all the evidence in a fair and reasonable way.* There must be a candid consideration of all the evidence and if, after this candid consideration is had by the jurors, there remains in their minds a conviction of the guilt of the accused, then there is no room for a reasonable doubt. (Emphasis added.)

[35] In our judgment, the learned judge's direction unto himself amply met the requirements suggested by the learned author in the aforesaid passage with which we wholly agree. It is only after a careful analysis of the evidence that he came to the conclusion that the accused had not raised a reasonable doubt.

F CONFESSION OF THE SECOND ACCUSED

[36] We need only be very brief on this point. In our view, having regard to the evidence on the *voir dire* and the brief note of the learned judge's reasons, the confession of the second accused was wrongly admitted. It would appear that the learned judge had shifted the burden onto the second accused to prove that he had been oppressed. That in our view is an error. We have therefore excluded from our minds the confession and all references to it in the record of appeal, including those areas where the learned judge called it in aid.

[37] Nevertheless, we find abundant evidence to support the convictions of the accused persons. It is settled law that an accused's conviction may be upheld if there is other evidence to support it after excluding an inadmissible confession. See *Lee Yew Seng v Public Prosecutor* [1967] 1 MLJ 215.

I CONCLUSION

[38] These appeals are, at the end of the day against findings of fact made by the learned judge which are based on the credibility of witnesses seen and

heard by him. The approach that we should take to such a case as the present was stated by Yong Pung How CJ, Singapore in *Arts Niche Cyber Distribution v Public Prosecutor* [1999] 4 SLR 111, a case cited in several subsequent decisions. His Honour there said:

> It is trite law that an appellate court will not interfere with a trial judge's findings of fact unless they are plainly wrong (*Lim Ah Poh v PP* [1992] 1 SLR 713). As I observed in *PP v Azman bin Abdullah* [1998] 2 SLR 704:
>
> > it is well-settled law that in any appeal against a finding of fact, an appellate court will generally defer to the conclusion of the trial judge who has had the opportunity to see and assess the credibility of the witnesses. An appellate court, if it wishes to reverse the trial judge's decision, must not merely entertain doubts whether the decision is right but must be convinced that it is wrong ...
>
> Where the trial judge's findings of fact are based on his assessment of the witnesses' veracity and credibility, the appellate court will be even more reluctant to overturn his findings: *Yap Giau Beng Terence v PP* [1998] 3 SLR 656.

[39] Before we conclude, we must commend all police officers who were in conduct of the investigation in this case. The speed with which they acted, the thoroughness of their investigation and their courage in conducting the investigation is truly remarkable. But for their timely action and careful investigation this crime may never have been discovered and the accused brought to justice. Likewise, we would commend the learned deputy who conducted the trial in the court below for the way in which he presented the evidence, given the narrow corridor within which he had to work, and his cross-examination of the accused persons.

[40] For the reasons already the appeals against convictions are dismissed. We will now hear arguments on sentence.

Appeals dismissed.

Reported by Loo Lai Mee